No. 78-442

In the Supreme Court of the United States

OCTOBER TERM 1978

OTM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of the decision of both courts below that amounts that it paid to a related corporation, Texas Industrial Equipment Rental Co. (TIERCO),[1] for the rental of equipment are not deductible for federal income tax purposes to the extent they exceeded the fair rental value of the equipment. Petitioner does not deny that the rentals in question in fact exceeded fair value (Pet. App. 3-A to 4-A). It nevertheless contends that the Commissioner is required to accept deductions for payments made to related parties unless he invokes his authority under Section 482 of the Internal Revenue Code of 1954 to allocate income or deductions between such related entities and makes the "correlative adjustments"

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[1] J.C. Bradshaw and Kenneth Bradshaw owned controlling interests in both corporations (Pet. App. 3-A).

provided by Treasury Regulations on Income Tax, Section 1.482-1(d)(2) (26 C.F.R.). Under those provisions, whenever adjustments are made to the income of one member of a group of commonly-controlled taxpayers under Section 482, "appropriate correlative adjustments" to the income of other members of the controlled group may also be required. Here, however, the Commissioner did not invoke his authority under Section 482, and therefore did not make any correlative adjustments to TIERCO's income. Nor did TIERCO seek a reduction of its own income for the period in question by filing an amended return or claim for refund as it might have done within the applicable statutory period of limitations (Pet. App. 4-A).

Petitioner argues (Pet. 17-22) that the Commissioner's failure to proceed under Section 482 and to make a correlative adjustment to TIERCO's gross income precludes disallowance of the claimed deductions. But the scope of the Commissioner's authority under Section 482 is irrelevant to the question presented—whether petitioner is entitled to a rental deduction in the first instance under Section 162. As this Court has stated, "a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms." *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934). Petitioner has failed to do so.

It is well established that a business expense can be deducted under Section 162 only if it is "reasonable in amount." *Tulia Feedlot, Inc.* v. *United States*, 513 F. 2d 800, 804 (5th Cir.), cert. denied, 423 U.S. 947 (1975). The requirements of Section 162 apply alike to taxpayers that are members of commonly-controlled groups and to those that are not. Where, as here, a taxpayer seeks to deduct a payment that is unreasonable in amount or otherwise fails

to meet the requirements of Section 162, the deduction may be disallowed for that reason alone, without resort to the Commissioner's authority under Section 482, even though the payment is to a related entity. See *Tulia Feedlot, supra*, 513 F. 2d at 806; *Brown Printing Co.* v. *Commissioner*, 255 F. 2d 436, 438-440 (5th Cir. 1958). Since it is undisputed that the rentals in this case were excessive, the deductions in question are not permitted under Section 162, and were properly disallowed.

Moreover, petitioner's argument that the Commissioner is required to proceed under Section 482 in the case of deductions for payments to related taxpayers finds no support either in the statutory language or in the case law. Indeed, as the district court observed (Pet. App. 8-A), this contention is squarely contrary to Section 1.482-1(b)(3) of the Regulations, which specifically provides that, "Section 482 grants no right to a controlled taxpayer to apply its provisions at will, nor does it grant any right to compel the district director to apply such provisions."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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